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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re DARRYL A. SCHLAPPI on Habeas Corpus.	D053434 (Super. Ct. No. CRN17776)

Petition for writ of habeas corpus by state prisoner challenging denial of parole. Runston G. Maino, Judge. Relief denied.

In 1991, a jury convicted Darryl A. Schlappi of attempted premeditated murder and assault with a deadly weapon, and found that he personally used a firearm in committing the offenses. (Pen. Code, §§ 187, 664, 245, subd. (a)(2), 12022.5.) A trial court then sentenced Schlappi to life in prison with the possibility of parole, plus two years. (See *id*., § 664, subd. (a) [punishment for attempted premeditated murder is "imprisonment in the state prison for life with the possibility of parole"].) In November 2007, the California Board of Parole Hearings (the Board) held a parole hearing to

consider Schlappi's release. At the conclusion of the hearing, the Board determined that Schlappi was unsuitable for release on parole.

Schlappi filed a petition for a writ of habeas corpus in the superior court, challenging the Board's decision as a violation of his constitutional rights. The court denied the petition. Schlappi now raises this same contention in a petition for a writ of habeas corpus before this court. Specifically, Schlappi argues that the Board relied solely on the aggravated nature of his commitment offense in determining that he was unsuitable for parole, a practice our Supreme Court recently disapproved of in *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*). As explained below, we conclude that the Board's decision did not violate the due process principles set forth in *Lawrence* and *Shaputis* and, consequently, we deny the petition.

FACTS AND PROCEDURAL HISTORY[1]

A. *Commitment Offense*

On September 8, 1988, Schlappi and two other men, Glen Sinaiko (aka Psycho) and Randy Gray (aka Cowboy) lured William Odom, Jr. to a riverbed near the San Luis Rey River in Oceanside. Once there, Sinaiko shot Odom in the lower abdomen with a shotgun; Schlappi then shot Odom with the same shotgun as Odom lay on the ground in a fetal position. Odom died of his wounds.

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1 The facts summarized here were recounted in the parole hearing and in an opinion issued by this court when Schlappi appealed his convictions. (*People v. Schlappi* (July 20, 1992, D013893) [nonpub. opn.].)

After the shooting, Sinaiko went to the Oceanside police station and confessed to the crime, implicating Schlappi as well. Schlappi was arrested in Utah and at first denied any involvement. Schlappi later admitted to being present during the crime but denied shooting the victim.

In his testimony to the Board, Schlappi explained that the three men confronted Odom over a drug debt Odom owed to Sinaiko. Schlappi said that Sinaiko pointed the gun at Odom and demanded money. When Odom grabbed for the gun, Sinaiko shot him. Sinaiko then gave Schlappi the gun and ran to their car. According to Schlappi, "I . . . shot him, you know, for self-preservation and because I figured he might identify us."

B. *November 2007 Parole Hearing*

On November 8, 2007, approximately 16 years after Schlappi was sentenced to life in prison, the Board held a hearing to consider Schlappi's eligibility for release on parole. At the hearing, Schlappi was represented by counsel. His release was opposed by a representative from the district attorney's office. At the conclusion of the hearing, the Board commended Schlappi for his progress in acquiring vocational skills in prison and avoiding serious disciplinary action. Nevertheless, the Board concluded that Schlappi was "not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released." In its ruling, the Board explicitly relied on the following factors: (i) "[t]he [commitment] offense was carried out in an especially cruel and callous manner," that demonstrated "an exceptionally callous disregard for human suffering"; (ii) "[t]he motive for the crime was inexplicable or very trivial"; (iii) Schlappi had a "record of assaultive behavior starting with his juvenile history at age seventeen"

that "escalated to a murder";[2] and (iv) Schlappi's post-release plans needed further development.

DISCUSSION

Schlappi contends that the Board's decision must be reversed because it is so lacking in factual support that it constitutes a denial of his constitutional rights to due process. While Schlappi "concedes he committed a very serious crime," he emphasizes that under *Lawrence* and *Shaputis*, the commitment offense alone cannot support a denial of parole absent some evidence of current dangerousness and, according to Schlappi, "the [Board] failed to allege any nexus between the commitment offense" and his current dangerousness.

A prisoner who has been denied parole is entitled to a limited review of the "factual basis" for the Board's decision "in order to ensure that the decision comports with the requirements of due process of law." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 658.) In conducting this review, "the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation." (*Ibid.*)[3]

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2 At the hearing, the deputy district attorney stated that Schlappi's pre-commitment offense criminal record included a prior assault as a juvenile as well as "a battery charge . . . and a weapons charge." Although we do not rely on this argument in our ruling, we note that the Attorney General asserts that Schlappi's criminal record is even more extensive, and includes convictions for possession of a controlled substance, manufacturing and selling a dangerous weapon, public drunkenness and battery.

3 The factors the Board considers in determining suitability for release on parole are set forth in a series of regulations. The regulation governing the instant case can be

In the face of conflicting decisions of the courts of appeal, our Supreme Court recently clarified this standard of review, explaining that the "mere existence of a regulatory factor establishing unsuitability [for parole] does not necessarily constitute 'some evidence' that the parolee's release unreasonably endangers public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1225.) In addition, a denial of release violates due process if it relies solely on the fact that "the circumstances of the offense exhibit viciousness above the minimum elements required for conviction of that offense." (*Id.* at p. 1221.) Rather, the focus must be on current (not past) dangerousness, and therefore, the "relevant inquiry is whether some evidence supports the *decision* of the Board . . . that the inmate constitutes a current threat to public safety." (*Id.* at p. 1212.) This standard is, thus, "unquestionably deferential," but nevertheless "not toothless." (*Id.* at p. 1210; *In re Scott* (2004) 119 Cal.App.4th 871, 898 [noting that "[t]he exceedingly deferential nature of the 'some evidence' standard of judicial review . . . does not convert a court reviewing the denial of parole into a potted plant" (citation omitted)].)

Applying this standard of review to the present case, we conclude that "some evidence" supports the Board's decision to deny Schlappi release on parole.

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found at California Code of Regulations, title 15, section 2402. (See Cal. Code Regs., tit. 15, § 2400 [explaining that "[t]he criteria and guidelines in this article apply to prisoners sentenced to prison for first and second degree murders committed on or after November 8, 1978 and attempted murders where the perpetrator is sentenced for life pursuant to the provisions of Penal Code section 664," and emphasizing that "[t]he guidelines in this article are based on the public's expressed intent . . . that a person convicted of first or second degree murder or attempted murder, as specified, should be incarcerated for an extended period of time"].)

Contrary to Schlappi's contentions, it is clear from the record that the Board did not act in the manner forbidden by *Lawrence* — relying reflexively on the aggravated nature of Schlappi's commitment offense to deny parole. Rather, the Board concluded that the nature of Schlappi's commitment offense, along with other factors, indicated an unacceptable risk of *current* dangerousness.

As explained below, the Board's ruling highlighted three general areas of concern, each of which are consistent with both the governing regulations and an inquiry into current dangerousness: (i) the nature of Schlappi's commitment offense; (ii) Schlappi's pre-incarceration criminal history; and (iii) Schlappi's post-release plans.

With respect to the commitment offense, the Board's findings mirrored three unsuitability factors contained in the governing regulations:

- "The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(B));
- "The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(D)); and
- "The motive for the crime is inexplicable or very trivial in relation to the offense." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(E).)

The applicability of these factors was well supported by the record. In Schlappi's own testimony to the Board, he explained that the murder resulted from a trivial motive — the payment of a $60 drug debt. Schlappi further testified he agreed to assist Sinaiko to recover the debt simply to gain "acceptance." With respect to the callous and dispassionate nature of the offense, Schlappi stated that he shot Odom from close range with a shotgun while Odom was on the ground "in a curled up . . . fetal position";

Schlappi stated that after Sinaiko fled, he shot Odom "because I figured he might identify us." Schlappi emphasized that while he was trying to shoot Odom in the head, he missed, and the shot "grazed [Odom's] neck and went into his legs."

As the regulations quoted above suggest, it is perfectly appropriate for the Board to consider the nature of the commitment offense in determining current dangerousness. Indeed, as our high court explained in *Lawrence*, "the Board . . . may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, . . . if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1221; *In re Lewis* (2009) 172 Cal.App.4th 13, 30 ["There is nothing inherently improper about the Board basing 'a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history'"].)

Here the unsuitability factors related to Schlappi's commitment offense were plainly connected to the inquiry into Schlappi's current dangerousness. Unlike the petitioner in *Lawrence*, whose offense arose from unusual "circumstances not likely to recur" (*Lawrence*, *supra*, 44 Cal.4th at p. 1226), there was nothing unusual about the circumstances that led to Schlappi's commitment offense (i.e., a desire for acceptance and an invitation to engage in criminality). As a consequence, there is a high likelihood that Schlappi, upon release, will encounter circumstances analogous to those that led up to the commitment offense and, thus, that he could reoffend in a similar manner. (See *Shaputis*, *supra*, 44 Cal.4th at p. 1259 [concluding that Governor could properly conclude that "the

aggravated nature of the offense indicates that petitioner poses a current risk to public safety" because "[t]his is not a case, like *Lawrence*, *supra*, 44 Cal.4th 1181, 1225, in which the commitment offense was an isolated incident, committed while petitioner was subject to emotional stress that was unusual or unlikely to recur"].)

Along these same lines, the Board's ruling relied heavily on Schlappi's pre-incarceration history of violence. (See *Lawrence*, *supra*, 44 Cal.4th at p. 1214 [recognizing relevance of offender's "pre- or post-incarceration history" in evaluating current dangerousness].)[4] The Board emphasized the circumstances of Schlappi's juvenile offense in its ruling and noted that the offense, like the commitment offense, indicated that Schlappi reacted to trivial, commonly occurring events (this time a dispute over money owed for a used car) with unlawful violence.[5] The Board concluded in its ruling that in light of the prior record, the commitment offense was not a one-time

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4 Again, this distinguishes Schlappi from the petitioner in *Lawrence* who had a "prior crime-free life." (*Lawrence*, *supra*, 44 Cal.4th at p. 1226.)

5 While Schlappi attempts to minimize the prior assault by asserting that it occurred when he was a juvenile, the fact that a prisoner demonstrated "serious assaultive behavior at an early age" is actually an aggravating factor under the applicable regulations. (See Cal. Code Regs., tit. 15, § 2402, subd. (c)(2) ["Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age."]; see also, *id.*, § 2402, subd. (d)(1) [noting as a suitability factor: "No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims."].)

aberration, but an escalation of the same type of violent behavior that typified the juvenile offense: "The violence started as a teenager, and . . . escalated to a murder."[6]

Finally, the Board's concerns with Schlappi's pattern of criminal violence were exacerbated by the shortcomings in his post-release plans. At the hearing, the commissioners' questioning revealed that Schlappi's plans for release were largely undeveloped, and the Board specifically noted this concern in its ruling, urging Schlappi to further develop his post-release plans for the next hearing.[7] Given the evidence noted above of Schlappi's current dangerousness, the uncertainty of Schlappi's post-release plans further supported a conclusion that Schlappi could easily fall into old patterns of criminality and violence. (See Cal. Code Regs., tit. 15, § 2402, subd. (d)(8) [stating as suitability factor: "Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release."]; *In re Honesto* (2005) 130 Cal.App.4th 81, 97 [recognizing that insubstantial plans for release supported conclusion of Board that prisoner was not suitable for parole].)

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6 In his petition, Schlappi emphasizes that the Board erred by labeling Odom's killing a "murder." We cannot fault the Board on this ground. The killing was clearly a murder (Sinaiko pleaded guilty to second degree murder), although Schlappi was convicted only of attempted murder for his part in the offense. Further, we see little significance in the distinction for purposes of the relevant inquiry: Schlappi's current dangerousness. As Schlappi testified at the hearing, his intent was to kill Odom, and Odom died as a result of the wounds he incurred in a debt collection effort conducted by Schlappi and his accomplices.

7 Schlappi identified Monterey as his "primary choice" for relocation upon release, where a pastor had offered to assist him with employment and a place to live. Schlappi was not sure, however, what kind of job it would be, how much he would earn, or what the living arrangements were, and had not communicated directly with the pastor.

Taken together, the three primary areas of concern noted in the Board's ruling — the facts of the commitment offense, the record of previous violence and the absence of concrete release plans — constituted "some evidence" to support the Board's conclusion as to Schlappi's current dangerousness. (Cf. Cal. Code Regs., tit. 15, § 2402, subd. (b) ["Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability."].) We recognize, as Schlappi emphasizes, that other factors such as Schlappi's behavior in prison and his positive psychiatric evaluations would support a contrary conclusion, but our role is not to reweigh the applicable factors. (*Shaputis*, *supra*, 44 Cal.4th at p. 1260 [emphasizing that "'the precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the'" Board].) Rather, we must simply determine "'whether there is some evidence in the record that supports the [Board's] decision'" and, as explained above, this low threshold has been met. (*Id.* at p. 1261 [emphasizing in rejecting challenge to denial of parole that "[t]he Governor did not disregard petitioner's behavior in prison, but rather considered it to be one of several factors" that was outweighed by others "that suggest petitioner remains a current danger to the public"].)

We do not mean to imply by our ruling that the Board would be justified in relying on immutable factors to perpetually deny Schlappi release. At some point, as Schlappi's performance in prison continues to reflect a nonviolent and law-abiding character, the suitability factors undoubtedly will eclipse the immutable characteristics that formed the primary (although not exclusive) basis for the Board's decision. We are simply not

convinced, on the record before us, that the evidence that this point has been reached is so "overwhelming" that we must reverse the Board's considered decision as a violation of due process. (*Lawrence*, *supra*, 44 Cal.4th at p. 1191 [granting petition where the "evidence of the inmate's rehabilitation and suitability for parole under the governing statutes and regulations is overwhelming," and "the only evidence related to unsuitability is the gravity of the commitment offense, and that offense is both temporally remote and mitigated by circumstances indicating the conduct is unlikely to recur"]; *Shaputis*, *supra*, 44 Cal.4th at pp. 1249, 1260 [rejecting challenge to Governor's denial of parole to prisoner who was "71 years of age, has had three heart attacks, and suffers from other chronic health problems" even though "[i]t may be reasonable to conclude . . . that petitioner's many years of sobriety, advanced age, and chronic health problems suggest he . . . will not relapse into violent conduct, and thus does not remain a risk to public safety"].) Consequently, we deny the petition.[8]

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8 In a document entitled "Objections to Superior Court Judge[']s Ruling on Habeas Corpus," Schlappi argues that the Board erred by relying on a statement regarding Schlappi's offense from a person who did not testify at Schlappi's trial. The hearing transcript reflects that the commissioners asked Schlappi about this statement, but there is no suggestion in the Board's ruling that it relied on it in denying him release. We can see nothing improper in *asking* Schlappi about the statement, and there is certainly no argument that doing so violated Schlappi's constitutional rights. (Cf. Cal. Code Regs., tit. 15, § 2402, subd. (b) ["All relevant, reliable information available to the panel shall be considered in determining suitability for parole."].)

DISPOSITION

The petition is denied.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

MCINTYRE, J.